In the Supreme Court of the United States

P. L. FLANIGAN,

Petitioner,

vs.

THE COUNTY OF SIERRA,

Respondent.

BRIEF FOR RESPONDENT

The brief of petitioner fairly states the case, except the unintentional omission of a portion of section 2 of the ordinance. Said section 2 is as follows:

"SECTION 2. Each and every person, co-partner-"ship, firm or corporation, who may engage in the "business of raising, grazing, herding or pasturing "sheep within the County of Sierra, State of Califor-"nia, in order to procure a license therefor, must "present to the License Collector of said county, at "the time of making application therefor, the affidavit "of such owner, his foreman, agent or person in "charge of such sheep, showing the number of sheep "owned by, and in the possession of, and under the "control of such applicant for license within said "county, and upon presenting such affidavit and the "payment of the license tax, as prescribed in Section

"1 of this ordinance, the applicant shall be granted "a license to raise, graze, herd or pasture sheep within "the said County of Sierra.

"The Collector, or his deputy, may administer all "oaths under this section, and must do so without "charge."

Petitioner contends:

1. That the ordinance under which this action was commenced was repealed by the act of the legislature of the State of California of March 23, 1901, and hence the action is abated, and argues:

(a). That the ordinance is "by its very terms" a revenue measure, and hence repealed, and

(b). That the right upon which respondent founded its action is penal in its nature and hence the repeal destroyed the remedy, and that the cause of action became as though it had never been.

2. That the ordinance is in conflict with the Constitution of the State of California, (1) it imposes double taxation; (2) it is not uniform in its operation, and, (3) it levies a tax without a prior assessment. And argues

(a). That the license is a tax on the animals and not on the business.

(b). That the sheep within the county have already been assessed and taxed for the purpose of revenue and that the ordinance imposes an additional tax for the same purpose.

(c). That all the sheep in the county are not taxed, and

(d). That the same tax is placed on all kinds of sheep and on lambs as well as sheep.

Respondent contends:

1. That the ordinance was passed in the exercise of police power and for the purpose of regulation, and was not, therefore, repealed.

2. That when petitioner commenced to do business in the county he became indebted to respondent in the amount due for the license. The right to the sum due vested in the county; hence no repeal could affect it.

3. That all constitutional questions raised have been decided adversely to petitioner by the Supreme Court of the State of California.

The ordinance was passed in the exercise of police power and for the purpose of regulation, and was not, therefore, repealed.

It is conceded that the power of the Board of Supervisors of the county to license for purpose of revenue was repealed by the Act of the Legislature of the State of California of March 23, 1901, (Cal. Stat. 1900, Chap. CCIX., p. 635, hereinafter cited as Section 3366, Pol Code); but even so it does not necessarily follow that the ordinance in question here was repealed. If, as petitioner contends, the ordinance *by its very terms* is a revenue measure, then, certainly the ordinance was repealed; but, if the ordinance is a regulatory measure, the contrary would follow as a matter of course. At the time of the passage of the ordinance the laws of California contained two grants of power to the legislative body of the county authorizing its enactment, one found in the Constitution and one in the General Laws.

The Constitutional provision is as follows:

"Any county * * * may make and enforce "within its limits all such local, police, sanitary and "other regulations as are not in conflict with general "laws."

California Const., Art. XI, Sec. 11

The County Government Act provided:

"That the Board of Supervisors in their respective "counties shall have jurisdiction and power under "such limitations and restrictions as are prescribed by "law to license for purposes of regulation and revenue "all and every kind of business not prohibited by law,

"and transacted and carried on in such county * * * to fix the rates of license tax upon the same "and to provide for the collection of the same by suit "or otherwise."

County Government Act, Sec. 25, Sub. 25, Stat. 1897, p. 465.

"Of the power of the State to authorize the license "of all classes of trades and employments, there is no "doubt * * * But a legislative grant of power "to a municipal corporation to license business, etc., "within its corporate limits, does not necessarily in- "clude a power to impose license for revenue pur- "poses.

"The distinction between the two powers is well "recognized. Imposing licenses for regulating busi- "ness, etc., is an exercise of the police power, while "imposing them for revenue purposes is an exercise "of the taxing power." (Citing 2 Dillon Mun. Corp., Sec. 768.) "It may therefore be questionable whether "before the Constitution of 1897 the city had under its "Charter power to impose licenses for purposes of rev- "enue; but under the provisions of the Constitution "which we have quoted (Secs. 11 and 12, Article XI.) "there is no doubt of the power of municipalities to "impose licenses for the purposes of regulation, or "revenue, or both regulation and revenue."

In re Guerrero, 69 Cal. 90.

"We do not deem it necessary to discuss the ques- "tion as to whether the license in question is imposed "for revenue purposes or for the purposes of regula- "tion, for the reason that the Board possessed author- "ity to impose it for either, or both." (Citing *Ex parte Mount*, 66 Cal. 448).

Ex parte Mirande, 73 Cal. 374;
See also *County* of *El Dorado* v. *Meiss*, 100 Cal. 270;
County of *Inyo* v. *Erro*, 119 Cal. 120.

In *ex parte Mount* the ordinance in question provided that every person or firm or corporation who at any fixed place of business sold any goods, wares or merchandise, whether on commission or otherwise (except such as were sold by auctioneers under license) should obtain from the License Collector a license, and pay therefor the amount of money to be determined and regulated by the amount of sales made or business transacted. The ordinance then proceeded to graduate the amount of license required to be paid in proportion and according to the amount of sales or business transacted by the person or firm, and the Court say as follows:

"It is claimed that Section 4 of the Act simply pro-"vides that the City Council shall have power to make "regulations for licensing, taxing and regulating all "such vehicles, business and employments as the pub-"lic good may require, but that it contains no express "grant of power either to issue or grant or to require "a license to collect any money or tax therefor, but we "are of the opinion that the power of regulating or to "make regulations was sufficient, and that it carries "with it and includes the power to pass an ordinance "requiring a license to be taken out, as was done by "the ordinance in question * * * It seems to us "very clear that the power exercised by the Common "Council and complained of in this case was vested in "that authority by the Act of 1862 amendatory of the "City Charter, and that the delegation of such power "by the Legislature was constitutional is equally clear. "It comes within what is known as the police power "for regulation, and is properly vested in the munici-"pality."

In the case respondent made the point that the ordinance was authorized by Sections 11 and 12 of Art. XI of the Constitution of 1879, in reference to which the Court say:

"But we think the second ground relied on by re-"spondent in support of the ordinance is equally "strong and unanswerable."

"By section 2 (II), Art. XI of the constitution it is "provided: 'That any city, town or township may "make and enforce within its limits all such local, sani- "tary, and other regulations as are not in conflict with "general laws.' Here the delegation of power by the "organic law is very broad and comprehensive, and "we have had occasion in several cases to construe the "foregoing section of the constitution. (Court cites "Ex parte Walters, 65 Cal. 269; Ex parte Moynier, "65 Cal. 33)."

Thornton, Judge, concurring says:

"It is unnecessary to decide whether the power with "which the City Council is by the Act of 1862 invested "springs from the police power or the power to tax "and raise revenue. The power is given and can be "amply given under either source of authority. "(Const. Art. XI. Secs. 11 and 12.)"

Ex parte Mount, 66 Cal. 448.

"The ordinance is authorized by the Legislature, "and is a part of the local police regulation of the city "and relates to matters within the city. Our attention "has not been called to any general statute which, in "terms, or by application, prohibits the imposition of "a license tax as a police regulation."

Ex-parte Ah Toy, 57 Cal. 92.

"All doubts are to be resolved in favor of its valid- "ity, and likewise all proper presumptions are to be "invoked to that end. For these reasons alone the "Court feels justified in construing the words 'license "tax as synonymous with 'license fee or charge'; for "the words 'license tax' do not necessarily and always "mean a 'license tax' assessed and collected for pur- "poses of revenue."

Ex parte Pfirrman, 134 Cal. 147.

"The power to make these regulations is by this "section (Sec. 11, Art. XI. of the Constitution) con- "ferred upon the city as well as upon the county, and "must be held to be equally authoritative in each. It "is a portion of the law-making power which the peo- "ple through their Constitution have conferred upon "these respective bodies, and its exercise is entitled to "the same consideration and to receive the same "obedience as that portion of the same power which by "the same instrument has been conferred upon the "legislature. The regulations made under this au- "thority are none the less a part of the law because the "authority to make them is conferred immediately by "the Constitution than if it had been conferred imme- "diately through an Act of the Legislature."

Ex-parte Roach, 104 Cal. 276.

In addressing itself to the power of the Board of Supervisors of a county to license, the Supreme Court of California in a late case say:

"But aside from the County Government Act, am- "ple and full power is given to the Board of Supervi- "sors by Art. XI. of the Constitution 'any County, "City, Town or Township may make and enforce "within its limits all such local, police, sanitary and "other regulations as are not in conflict with general "laws.'"

County of Los Angeles v. *Eikenberry,* 131 Cal. 461.

From the above authorities it is apparent that the county was authorized by Section 11 of Article XI of the Constitution to pass an ordinance as an exercise of its police power and for purposes of regulation licensing the business of raising, grazing, herding and pasturing sheep unless the ordinance in some way conflicted with general laws. If the ordinance can be construed to be passed for purposes of regulation it would not conflict with any general law to which at-

tention has been called. It is only by construing the ordinance to have been passed for purposes of revenue and not for regulation that it can be claimed to be in conflict with a general law, (Sec. 3366, Pol. Code, Cal.) and hence without the protection of the Constitution. This brings up the question is the ordinance "by its very terms" a revenue measure? If it is not, it is plain that much of the force of petitioner's argument on the point is lost. The ordinance on its face does not express whether it was passed for the purposes of revenue or for regulation, and whether it was for one purpose or the other depends upon whether or not, on any reasonable theory, the legislative body which passed it had the power to exact a license fee of ten cents a head on the business of raising, grazing, herding and pasturing sheep for the purpose of recompensing the county for the necessary expense of issuing the license, the expense attending direct regulation and oversight, and the incidental cost to which the county is subjected in providing for and maintaining a proper system of supervision. The only office of the ordinance is to fix the fee, provide for its collection, and for the issuance of the license, and whether the demand of the fee by the county evidenced the exercise of the police power of its legislative body or its intention to tax for purpose of raising revenue would depend upon the purpose for which the ordinance was passed; the form of the ordinance would not control unless, probably, its purpose was expressed upon its face, but in the absence of such expression the form might be the same in both instances, (*Cooley* on *Taxation*, p. 586) and in determining what fee is reasonable, the legislative body may take into consideration the cost of issuing the license, collecting the fee, regulating and supervising of the business, and whatever extra cost the county may be put to on account of this particular businss being transacted in the county.

"Moreover in fixing upon the fee, it is proper and "reasonable to take into account not the expense "merely of direct regulation, but all the incidental con- "sequences that may be likely to subject the public to

"cost in consequence of the business licensed. In some "cases the incidental consequences are much more im- "portant, and ,indeed, are what are principally had in "view when the fee is decided upon."

Cooley on Taxation, p. 599.

See also,

1 *Tiedman on State and Federal Control of Persons and Property*, p. 483.

The ordinary expenses of government are raised by the usual State, county and municipal tax levy, and estimates can be made that will approximate the ordinary cost of government; but not so in the matter of police regulation as applied to licensed business; that will depend upon many things which cannot be foreseen.

The cost of regulating the business of raising, etc., sheep, will depend largely upon the number of persons who engage in it. If none engage in the business, no cost will accrue, but if a large number engage in the business a large cost is the inevitable result; but who can foresee the number who may visit the county for the purpose of engaging in this business?

The incidental consequences, damage to roads and trails consequent on large bands of sheep crossing and recrossing; fires started by careless sheepherders, etc., are likewise uncertain in the same proportion.

"The plain purpose of the charter provision quoted "is to authorize the council to control and regulate "the business by means of the license and the fee the "general purpose being to promote order, to protect "buyers from imposition, etc., and not to suppress the "business, or raise revenue. The fact, however, that "the city derives a revenue incidentally from the rea- "sonable exercise of the police power in regulating

"and controlling the business is no serious objection "to such an ordinance."

City of St. Paul v. *Coulter,* 12 Minn. 16.

This Court in a late case has considered the matter, and say:

"In *Wiggins Ferry Co.* v. *E. St. Louis,* 107 U. S. "376 (27 L. Ed.), where a ferry company authorized "by an act of Assembly of the State of Illinois to carry "on its business and paying State taxes prescribed in "its charter, was called upon by a city ordinance to "pay a license tax, it was held by this Court that the "exaction of a license fee is an ordinary exercise of "police power by municipal corporations; that the "power of the State to authorize any city within its "limits to enforce a license tax on trades or callings "generally, especially those which are quasi public, "cannot be disputed, and that whether a license fee is "exacted under the power to regulate or the power to "tax is a matter of indifference if the power to do "either exists."

Postal Telegraph Cable Co. v. *Charleston City Council,* 153 U. S. 691 (38 L. Ed. 871).

By an ordinance passed in 1894 the Borough of New Hope, Pennsylvania, imposed an annual license fee of $1.00 per pole and $2.50 per mile of wire on the telegraph, telephone and electric light poles and wires within its limits. The Western Union Telegraph Company had constructed prior thereto, and had afterwards maintained and operated, a line of telegraph poles and wires through the borough, but had refused to pay the license fee. Action was brought to recover the license fees for four years, commencing with 1895. Evidence was given in the case as to the local business handled over these wires by the company, its own cost of inspection, repairs and maintenance, and also testimony tending to show that the borough did nothing in the way of inspecting or repairing or re-

moving or anything else in connection with the poles and wires of those telegraph companies. The point was made that the fee was unreasonable for the purposes of regulation.

Mr. Chief Justice Fuller delivered the opinion of the Court, which is in part as follows:

"It is conceded that the borough had the right, in "the exercise of its police power, to impose a reason- "able license fee upon telegraph poles and wires within "its limits, and that an ordinance imposing such fee is "to be taken as prima facie reasonable. * * * * " * While in the exercise of its control over its "streets it is admitted that the borough may supervise "the location of the poles erected to sustain the wires "of the plaintiff in error, may require them to be "marked, may make inspection of them as may be "necessary to protect the public welfare, and may im- "pose a reasonable license fee for the cost of such reg- "ulation and supervision and of the issuing of such "permits as may be required for the enforcement "thereof, yet it is contended that if the license fee "turned out to be in excess of the amount necessary "to reimburse the municipality the ordinance became "unreasonable and invalid. * * * * * * * * "In *Taylor* v. *Postal Teleg. Cable Co.*, 202 Pa. "583, 52 Atl. 128, the Supreme Court said: 'Clearly " 'the reasonableness of the fee is not to be measured " 'by the value of the poles and wires or of the land " 'occupied, nor by the profits of the business. The " 'elements which enter into the charge are the neces- " 'sary or probable expense incident to the issuing of " 'the license and the probable expense of such in- " 'spection, regulation, and police surveillance as " 'municipal authorities may lawfully give to the erec- " 'tion and maintenance of the poles and wires.

Western Union Telegraph Company v. *New Hope*, 187 U. S. 419 (23 Sup. Ct. Rep. 204).

In a similar case in which Mr. Justice Brewer de-

livered the opinion of the Court, this Court say as follows:

"When it (the license tax) is authorized only in "support of police supervision, the expense of such su- "pervision determines the amount of the charge; and, "if it were possible to prove in advance the exact cost "that would be the limit of the tax. In the nature of "things, that, however, is ordinarily impossible; and "so the municipality is at liberty to make the charge "large enough to cover any reasonable anticipated ex- "penses. It is authorized to fix such charge in advance "and need not wait until the end of the period for "which the license is granted. It may not act arbitrar- "ily or unreasonably, but the risk may rightfully be "cast upon the license, and the charge cannot be "avoided, because it subsequently appears that it was "somewhat in excess of the actual expense of the "supervision."

"The expenses attending direct regulations and "oversight are not only to be considered, but also the "incidental cost to which the municipality is subjected "in providing for and maintaining a proper system of "supervision. We cannot undertake to specify all the "particulars which should be brought into view where "the reasonableness of a municipal ordinance is chal- "lenged in a Court but we think that the rule laid "down in Cooley, Const. Lim. (Ed. 1886), p. 244, may "be safely adopted: *'A municipal corporation may im-* " *'pose, under the police power, such a charge for the* " *'license as will cover the necessary expenses of issu-* " *'ing it, and the additional labor of officers and other* " *'expenses thereby incurred.'* ". (Italics ours.)

Atlantic and Pacific Telegraph Company v. *Philadelphia*, 23 Sup. Ct. Rep. p. 817.

In another Federal Court presided over by a Justice of this Court, it is said:

"It must be regarded as settled that it is lawful for "a state to impose taxes upon property owned and "used within it by a corporation of another state, even

"when such corporation is engaged in interstate com-
"merce, and that the exaction of a license tax is a valid
"exercise of power by municipal corporations, in order
"to cover expenses to which they may be put in the
"enforcement of their police rules and regulations.
"Telegraph Co. v. Attorney General, 125 U. S. 530, 8
"Sup. Ct. 961; License Tax Cases, 5 Wall. 462; Wig-
"gins Ferry Co. v. City of East St. Louis, 107 U. S.
"365, 2 Sup. Ct. 257; Postal Tel. Cable Co. v. City of
"Charleston , 153 U. S. 692, 14 Sup. Ct. 1094. But
"these propositions are not disputed by the plaintiff in
"error. It is, in fact, conceded that the charges in
"question were imposed under the police power, and
"are valid if they are reasonable in their amount and
"in their mode of collection. The claim is that such
"charges, to be reasonable, must be limited to such
"amount as is necessary to reimburse the municipality
"for the expenses to which it is subjected in the en-
"forcement of such inspection rules and regulations as
"it may lawfully enact, and that in the present case the
"amount of the charges imposed by the ordinances is
"excessive, and so far above the reasonable expenses
"of the city that the ordinances are void. Whether the
"ordinances are reasonable can be judicially inquired
"into. When it is said, in some of the cases, that such
"a question is for the determination of the Court, it is
"not meant that the question may not properly be sub-
"mitted to a jury. What is meant by such observations
"is that Courts are not precluded from considering the
"reasonableness of the legislative act prescribing the
"terms and amount of the charges. It has sometimes
"been urged that such questions are peculiarly suited
"for legislative determination. And it must be ad-
"mitted that there is a presumption in favor of the va-
"lidity of the action of the legislative body, and that
"the evidence to justify a Court in holding otherwise
"must be clear and convincing. Still it must be re-
"garded as conclusively settled that the legislative au-
"thority to impose license fees or charges is not abso-
"lute, and must be exercised with due regard to the
"rights of the corporations to be affected.

"Regarding, then, the issue to be tried as one of "fact, we think it is one which, from its nature, is emi- "nently fit for the determination of a jury. The ex- "penses attending direct regulations and oversight are "not only to be considered, but also the incidental cost "to which the municipality is subjected in providing "for and maintaining a proper system of supervision. "We cannot undertake to specify all the particulars "which should be brought into view where the reason- "ableness of a municipal ordinance is challenged in a "court; but we think that the rule laid down in Cooley, "Const. Lim (Ed. 1886), p. 242, may be safely adopt- "ed: 'A municipal corporation may impose under the " 'police power such a charge for the license as will " 'cover the necessary expenses of issuing it, and the " 'additional labor of officers and other expenses there- " 'by incurred.'

"Not only is there a presumption in favor of the va- "lidity of the action of the legislative body, but the "facts upon which that action proceeds are so numer- "ous, and so liable to frequent changes, courts should "act cautiously in dealing with such a case, and admit "evidence of all the facts and circumstances that seem "to bear, even somewhat remotely, upon the issue. As "was said by the Supreme Court of Pennsylvania, in "Allentown v. Telegraph Co., 148 Pa., St. 119, 23 Atl. "1070 the amount of the license charges rests with the "city councils in the first instance, and it is only where "such discretion has been manifestly abused that the "courts are justified in interfering.

"In this view of the peculiar nature of the case, we "think the trial court erred in excluding the evidence "offered on behalf of the city, going to show that con- "siderable additional expense, in providing a greater "number of fire companies and apparatus, is rendered "necessary by the electric wires suspended in the "streets. If, indeed, a new condition of affairs has "been caused by the erection of wires and poles in the 'thoroughfares of the city, which makes it proper for "the authorities, in order to protect life and property, "to increase its police and fire force and equipment, we

"think such a state of facts might be shown, and was a "proper matter for consideration in fixing the amount "of the license charges, and in passing upon their "reasonableness. So, further, we think there was "error in excluding the evidence offered of the expen- "ses to which the city is, from time to time, put in con- "nection with the meeting of its councils for the pur- "pose of regulating the erection of wires and poles."

Philadelphia v. *Western Union Tel. Co.*, 89 Fed. Rep., p. 460. Opinion by Shiras, Circuit Justice.

"Obviously their intention is to regulate. To ac- "complish this object a license is required. Before it "can be issued twenty-five dollars must be paid, not "as a tax, as denominated in one of the sections of the "ordinance, but a price for the ferry franchise or priv- "ilege. They prohibited any one from exercising the "ferry privilege until a license be granted, and require "the twenty-five dollars to be paid, and a bond to per- "form the duties of ferryman, with approved security, "to be executed before the license can be granted, "thereby showing that the twenty-five dollars are ex- "acted as a price of the privilege, and that the license "is required as a means of regulating. This being "true, the twenty-five dollars is a license fee, and not "a tax."

Chilvers v. *People*, 11 Mich. 43.

"The only question presented for our consideration "is, Is the fee fixed by the ordinance in question reas- "onable?

"The power to license and regulate, granted by "the statute, was conferred solely for police purposes, "and municipal corporations have no right to use it as "a means of increasing their revenues. They can re- "quire a reasonable fee to be paid for a license. The "amount they have a right to demand for such fee de- "pends upon the extent and expense of the municipal

"supervision made necessary by the business in the "city or town where it is licensed. A fee sufficient to "cover the expense of issuing the license and to pay "the expenses which may be incurred in the enforce- "ment of such police inspections or superintendence "as may be lawfully exercised over the business, may "be required. It is obvious that the actual amount "necessary to meet such expenses cannot in all cases "be ascertained in advance, and that 'it would be futile "to require anything of the kind.' The result is, if the "fee required is not plainly unreasonable, the Courts "ought not to interfere with the discretion exercised "by the council in fixing it, and unless the contrary "appears on the face of the ordinance requiring it, or "is established by proper evidence, they should pre- "sume it to be reasonable."

(Citing Burlington v. Putnam Insurance Co., 31 Iowa, 105-106; Van Hook v. Selma, 70 Ala., 361; Van Ballen v. People, 40 Mich., 258; Laundry License Cases (Or.), 22 Fed. Rep., 701; Johnson v. Philadelphia, 60, Pa., 245; ex parte Chin Yan, 60 Cal., 78; ex parte Gregory, 20 Tex. App., 210; State Center v. Barenstein, 66 Iowa, 249; Fisher v. Harrisburg, 2 Grant, 291; St. Louis v. Weber, 44 Mo., 547; Corrigan v. Gage, 68 Mo., 541; State v. Gas Co., 37 Ohio St., 45; Clason v. Milwaukee, 30 Wis., 316.)

"According to this rule we cannot say and it does "not appear that the fee required in this case is un- "reasonable. The contrary is presumed. Reversed."

City of Fayetteville v. *Carter*, 52 Arkansas, 301.

See, also,

Chilvers v. *People*, 11 Mich. 43.

Arkadelphia Lumber Co. v. *Arkadelphia*, 56 Ark. 370.

Ash v. *People*, 11 Mich. 347.

Littlefield v. *State*, 42 Nebraska, 223.

City of Jacksonville v. *Ledwith*, 26 Florida, 163.

Tomilson v. *Indianapolis*, 114 Ind. 142.
State Ex. Rel. White v. *Redmond*, 43 Minn., 250.
Marmet v. *State*, 45 Ohio, 63.
Ferry Company v. *East St. Louis*, 107 U. S., 365.

Petitioner refused to try the question of the reasonableness of the fee. He declined to answer and make the issue, and in the absence of a trial it must appear from the *face* of the ordinance that the fee is so excessive that the Court can infer as matter of law that the purpose of the ordinance was to raise revenue and not to reimburse the county for the cost of regulation of the business licensed.

Cooley on *Taxation*, p. 410; 1 Tiedman on State and Federal Control, etc., 483.
Glenn v. *Mayor*, 5 Hill & J., 424.
Ex parte Mirande, 73 Cal., 374.
In re Guerrero, 69 Cal., 95.
Merced County v. *Fleming*, 111 Cal., 46-51.
City of Brooklyn v. *Breslin*, 57 N. Y., 591-6.
County of Los Angeles v. *Eickenberry*, 131 Cal., 466.
Ex parte Pfirrman, 134 Cal., 143-7.
Price v. *People*, 193 Ill., 114.
St. Paul v. *Coulter*, 12 Minn., 41.
Grand Rapids v. *Brandy*, 105 Mich., 671.
Atkins v. *Phillips*, 26 Fla., 281.
Western Union Telegraph Co., v. *City of Philadelphia*, 12 Atlantic Rep., 144.
City of Uttumwa v. *Zekind*, 95 Iowa, 622.
City of Burlington v. *Unterkircher*, 99 Iowa, 401.
Vansant v. *Harlem Stage Co.*, 59 Md., 335.
Littlefield v. *State*, 42 Neb., 223.
People v. *Russell*, 49 Mich., 633.

The Legislature of California has expressly authorized the county to license and fix the rate of license tax.

"Where the grant is not made for revenue but for "regulation merely, a much narrower construction is to "be applied. A fee for the license may still be exacted, "but it must be such a fee only as will legitimately "assist in the regulation and of inspecting and regulat- "ing the business which it covers. If the state intends "to give broader authority, it is a reasonable inference "that it will do so in unequivocal terms."

Cooley on Taxation, p. 598.

Certainly in the case at bar the State has given the broadest authority possible in so far as it may give the county power to license for purposes of regulation, exercise its police power, and fix the rates of license tax upon the business licensed, and in the most unequivocal terms—here is found direct authority to fix a rate of license tax upon *all* businesses transacted in the county, and authority is also given to collect it by suit. Surely the Legislature contemplated that a sum of money should be exacted from the person transacting the business, something more than the cost of issuing the license.

See

Chilvers v. *People*, 11 Mich. 49.

The possibilities for expense to the county which can be directly attributed to this business are large, and in view of the law that most of the expenses of criminal prosecutions—the traveling expenses of the district attorney, and all expenses incurred by him in the detection of crime—the expenses incurred in the support of prisoners—fees of jurors—the accounts of the coroner—the fees of magistrates—the support of indigent sick—the contingent expenses of the county—the fees of constables (County Government Act, Sec. 228, Stat. 1897, 575-77), and in Sierra county the mileage of the sheriff and the fees of reporters (same Act, Sec. 205, p. 564-5, Stat. 1897), are all county

charges payable out of the general fund; the cost of the prevention and eradication of diseases among sheep is a county charge (Stat. 1889, p. 216), and that all indirect burdens laid upon the county by virtue of the sheep business being conducted in the county on such scale that one person grazes 25,000 sheep must be paid by the county, what Court can say that ten cents per sheep is excessive, with no other guide than the record in this case, and what the Court may judicially know?

If it could be shown at a trial of this action with the reasonableness of this license fee controverted, that this business is liable to degenerate into a nuisance by the county becoming overcrowded with sheep on account of the closing of pastures to that animal by forest reservations, settlements, etc., in other portions of the state, excellent authority has been cited for exacting a fee sufficient to restrict the number of those who might engage in the business, and as also appears from the following:

Certain defendants were convicted of peddling without a license, contrary to the provisions of a city ordinance entitled "Ordinance No. 19. Peddlers, how licensed," passed by the city council in the assumed exercise of the power granted them by the city charter "to license and regulate all peddlers doing business within the city," in which it was provided for the issuance of licenses and fixed the amount of the fee at $100 for a year, $60 for six months, $15 for a month, and $5 for one day. The point was made in the case that the ordinance was not a legitimate exercise of the police power to regulate peddling, but a mere tax for revenue purposes, as demonstrated by the unreasonable amount of the license fee exacted, and the fact that its provision in no way looked to the regulation or control of the business.

The Court say:

"The license fee exacted is somewhat large, and the "provisions of the ordinance looking to the regulation

"of the business of peddling are somewhat meager. "but the fourth section certainly contains provisions "tending to secure the orderly pursuit of the business; *"and the mere fact of exacting a license fee is one "method of restricting it, which is itself a legitimate "method of regulating some kinds of business.* The "latitude that is given to municipal bodies in fixing the "amount of license fees, and the duty of Courts not to "declare the amount thus fixed unreasonable, except "in very plain cases, have been fully considered by us "in former cases. (Citing cases). If this was a case "of one of the ordinary ligitimate kinds of business, "like that of butcher, baker, auctioneer, or the like, "which are not liable to become public nuisances, and "consequently no occasion or right existed to restrict "the number of persons who shall engage in it, it might "be a question whether the fee exacted would not be "unreasonable. But the evils liable to grow out of "some occupations may be such that their suppression "can only be attained to an appreciable degree by the "imposition of some restraint upon the pursuit of such "callings or kinds of business. In respect to the great "majority of occupations, no such evils are likely to "follow; and consequently it would not be competent "to attempt to restrain the number of those engaged "in them by the imposition of a large license fee. All "that could be required would be an amount sufficient "to pay the cost of issuing the license, and to defray "the expense of necessary police supervision. But "where the business is of such a nature that its prose- "cution will do damage to the public, or that it is liable "to degenerate into a public nuisance, then it is a legi- "timate exercise of the police power to impose a license "fee large enough to act as a restraint upon the number "of persons who might otherwise engage in such busi- "ness. Tied., Lim., 274 *et seq.*. (Second Ed. Vol. I "p. 484 *et seq.*) It is upon this principle that very "high license fees are exacted from those vending in- "toxicating liquors. Peddling, although in itself a "moral and lawful pursuit, is one of the kinds of busi- "ness which, if not thus restrained, is very liable to

"become a great nuisance, especially in cities, as al-
"most every one knows by actual experience; and in
"view of that fact it was a legitimate exercise of the
"police power vested in the City of Duluth to exact a
"license fee large enough to restrict the number of per-
"sons engaged in peddling, even although the sum was
"larger than enough to pay the cost of license and the
"expense of any police surveillance which the city
"might exercise over the business. In view of all the
"circumstances, we cannot say that the fee exacted is
"unreasonable."

City of Duluth v. *Krupp*, 46 *Minn*, 435.

"It is a matter of common knowledge and experi-
"ence that a fence will keep out cattle and horses that
"will not sheep or hogs. It is evident that in passing
"the statute cited relative to the running at large of
"hogs and the herding and grazing of sheep within
"two miles of dwelling houses, the legislature intended
"to further the public good and preserve the peace by
"preventing those conflicts which would naturally re-
"sult from the herding of sheep about the dwellings of
"settlers. The statutes were intended to promote the
"public good and avoid danger and injury to the citi-
"zen. They were also evidently intended to protect
"the health of the settlers, and as those questions are
"of legislative discretion and not judicial, we are not
"authorized to hold the statutes unconstitutional."

"It is contended by the appellant that every citizen
"has the right to pasture the public domain, and that
"if the statutes in question are held valid it amounts
"to taking property without due process of law. There
"is nothing in this contention. We know of no statute
"enacted by Congress which grants the citizen the
"right of pasturage upon the public domain, and coun-
"sel for appellant cites no such statute. Citizens graze
"their stock upon the public domain by sufferance of
"the general government, and not by virtue of any
"vested right."

Sifert v. *Johnson*,—Idaho—65, Pac. Rep. 710.

"In every state the keeping of livestock is under "police regulation. The clash of interest between "stock-raising and farming calls for the interference of "the state by the institution of police regulations, and "whether the regulations shall subordinate the stock-"raising interest to that of farming, or vice versa, in "the case of an irreconcilable difference, as is the case "in respect to the going at large of cattle, is a matter "for the legislative discretion, and is not a judicial "question. In the exercise of this general power of "control over the keeping of livestock, the state or "municipal corporation may prohibit altogether the "running at large of such animals and compel the own-"ers to keep them within their own enclosures."

2 *Tiedman Upon State and Federal Control of Persons and Property*, p. 838.

Again, continuing the speculation, it might appear that appurtenant to the mountain homes in many instances in Sierra county are small ditches conveying water for domestic purposes over the public lands of the United States, rights that had become vested by the appropriation of the waters of rivulets under state law, and in other cases long ditches appurtenant to mining claims, all of which are necessarily subject—the waters to pollution, and the ditches to injury—by large bands of sheep being herded across the ditches and in the watersheds and streams above.

It is no answer to say that the individual damaged has his action at law for damages or in equity for an injunction, for, discarding the propositions that it increases the business of courts, subjects the regular inhabitant of the county, and the public, to annoyance and cost, it causes a clash of interests, exasperates the citizen and leads to possible disorder, attempts to redress the wrong by force, consequent disturbance of the peace, and hence increased police expense.

Such a business, while not a public nuisance, *per se*, might under the circumstances above related be conducted so as to come within the definition of such

a nuisance, at any rate under such a state of facts it would be so detrimental to the welfare of a community as to justify the legislative body of the county in fixing a larger license fee for its regulation and supervision than in the case of a business where these features are absent.

"The state may interfere wherever the public inter-"ests demand it, and in this particular a large discre-"tion is necessarily vested in the legislature to deter-"mine, not only what the interests of the public re-"quire, but what measures are necessary for the pro-"tection of such interests."

Lawton v. *Steele,* 152 U. S. 135-38 Law Ed. 388.

The justification for "High License" in the case of the regulation of the liquor traffic is its being the indirect cause of increased cost to the public and that it is but just that the business which causes the increased cost should bear the burden. Of course it is not claimed here that the business of raising, grazing, herding and pasturing sheep is as harmful in its effect upon the public as the sale of intoxicating liquor by retail but it is claimed that the business largely increases the public expenditures of the county, which expenditures are made necessary solely by reason of this business. It is further claimed that the public lands of the county are the public pastures, the commons so to speak, and that the effect of the herding of large bands of sheep on the public lands is, that the sheep-herder has sole use of these public pastures, thereby excluding cattle-raisers, settlers, prospectors and pleasure-seekers from that part of the public domain, to the detriment of the county, and the country generally, hence it may be seen that the indirect burdens laid upon respondent by this business are capable of being approximated in a large sum when measured by their value in money.

The case of *Lawton* v. *Steele,* (152 U. S. 135), holds that it is the duty of the state to protect its fish-

eries because they are common to all; by force of the same reasoning it is the duty of the state to protect the public pastures, and the county would necessarily have the right to regulate the use of the pastures in such way as to make them most beneficial to the public.

It seems fairly deducible from the above authorities that the Court must presume and hold that the ordinance was passed as an exercise of the police power of the respondent and for purposes of regulation, in the absence of a finding that the fee is unreasonable after a trial of the issues.

Petitioner claims that the ordinance does not license the business of raising, grazing, herding and pasturing sheep, for the reason that it does not first "forbid or make illegal the carrying on of the business mentioned," and then consent that it may be carried on provided that a license is procured.

This is placing a narrow construction on the effect of the ordinance, when read in connection with the general laws of the State of California.

The Penal Code of the state (Sec. 435) provides:

"Every person who commences or carries on any "business, trade, profession, or calling, for the trans- "action or carrying on of which a license is required "by any law of this state, without taking out, or pro- "curing the license prescribed by such law, is guilty "of a misdemeanor."

The County Government Act (Cal. Stat. 1897, p. 465, Chap. CCLXXVII, Sec. 25, Sub. 25) provides that

"Any person, firm, or corporation transacting, or "carrying on such business without such license when- "ever prescribed is guilty of a misdemeanor," and the Supreme Court of the State has decided that a county of the State has no power to pass an ordinance punishing precisely the same acts which are punishable under the general laws of the State. (see *In se sic*, 73 Cal. 148, *Ex-parte Mansfield*, 106 Cal. 400, *Ex-parte Stephen*, 114 Cal. 282), hence it appears, that, when the ordinance and the general law are read together

transaction of the business is prohibited unless a license is taken out.

"If a statute inflicts a penalty for doing an act the "penalty implies the prohibition, and the thing is un-"lawful though there be no prohibitory words in the "statute." (1 Kent. Lecture XX, star paging 467).

"When a statute, with a view of affording protection "to the public, imposes a penalty for doing an act it "thereby prohibits it and renders it illegal. Thus, a "statute which imposes a penalty on a person who ex-"ercises, or occupies himself as a surgeon without be-"ing licensed, is a prohibition of such practice."

Sutherland on Statutory Construction, Sec. 335.

Therefore it is plain that the moment the license was prescribed by the county the transaction of the business was forbidden unless the license was taken out, hence the issuance of the license permits the person to transact the business.

The Supreme Court of the State of California has passed upon the point as follows:

"If, for example, the order provided no punishment "whatever for doing business without a license, but "merely provided what the license should be, it would "be valid, and the statute supplements it by making "the failure to comply with the order a crime, and pro-"viding the penalty."

Ex-parte Christensen, 85 Cal. 210, 212.

Again it is only a lawful business, and a business transacted and carried on in the county that the county can license—the grant of powers reads:

"To license * * * * * * * all and every

"kind of business *not* prohibited by law, and tran-
"sacted and carried on within the limits," etc.

Political Code, Cal. 3366; *County Gov. Act, Cal.* Sec. 25; Sub. 25 Stat. 1897, p. 465.

The decison in *Cache* v. *Jensen* was rendered in a case where there had been a trial on the merits, and much of the opinion is addressed to the facts of that particular case after a finding of facts showing that the raising, grazing, herding and pasturing of sheep in Utah was not detrimental to the public, and that the sheep were grazed in several counties in one season, one of the grounds for holding being that each county through which the sheep were herded might impose a license-tax and thus make the tax a burden.

The case is questionable authority here for several reasons: First, the Court expressly declines to follow the decisions of the Supreme Court of California, as appears from the following:

"Counsel for respondent states and relies on several "California cases where ordinances similar to the one "in question herein were held valid. It does not ap-"pear, however, from these decisions, that the condi-"tions under which sheep-raising is carried on in Cali-"fornia are similar to those under which the business "is conducted in this state; nor are the provisions of "the California constitution on the subject of taxation "the same as those in our constitution. But if, in both "states, all these things were similar, we should not be "inclined to follow these decisions."

Judge N. Baskin one of the judges, also dissented.

Again it does not appear that in the Utah constitution, counties have the right to legislate locally on these matters; and further it is submitted that on a careful reading the prevailing opinion is not sound in some particulars. For instance, the ordinance in question is condemned because it does not even contain a hint as to regulation of the business, nor that the

business requires any regulation, *"nor that the county will afford protection of any kind to the persons engaged in the business, nor that it is of such a character as to require regulation or protection."* (Italics ours.)

The power to license was for the purposes of regulation, and for this purpose to fix a fee to be paid. Now what regulation is contemplated? Certainly those police regulations as are needful to secure and preserve the public order and to protect each individual engaged in the business in the enjoyment of his own rights and privileges by requiring the observance of rules and order, fairness and good neighborhood by all around him. (Cooley on Taxation, p. 586.)

However it may be in Utah, in California the guaranty of such protection exists in its constitution and general laws without waiting the passage of the county ordinance to effect it.

In *Mayor* v. *Second Avenue* (32 N. Y., 261), the power under which the ordinance was passed did not expressly authorize the city to license nor to levy a license tax, and one of the reasons for the decision was that the city had already granted to the railroad the right to run its cars.

In *Merced County* v. *Helm* the Court determined *as matter of law* that the ordinance involved "by its very terms" was a revenue measure (the ordinance exacted $3,000 per quarter from all persons who sold liquor), and even as to the point decided, it has been held to have gone to the extreme verge of strictness. (See *Los Angeles* v. *Eikenberry*, 131 Cal. 467.)

From the fact that the ordinance provides that the moneys derived from the license tax "shall be paid over to the county treasury, as other moneys are, and be placed to the credit of the general fund of the county," petitioner concludes that the ordinance "by its very terms" is a fiscal, not a regulatory, measure, but in what way does that provision of the ordinance

indicate its purpose? It has been shown that most of the charges coming under the head of police charges are paid out of the general fund, so to that extent the money went into the proper fund. It may be admitted that road expenses are paid from the road fund, but the admission does no harm because the board of supervisors have power, under their general powers, to transfer from one fund to another.

"The board of supervisors * * * shall have "jurisdiction and power * * * * 18. To estab- "lish a salary fund and such other county funds as "they may deem necessary for the proper transaction "of the business of the county, and to transfer moneys "from one fund to another as the public interest may "require." (Stat. 1897, p. 463.)

Again the general law commands that all license money must be paid to the treasurer.

Sec. 3363, Political Code, Cal.

The fund into which the money, by the terms of the ordinance, is to be paid, furnishes no test as to whether the measure is for regulation or revenue, necessarily it cannot, for the reason that if the county has to pay the money out for the purpose of regulating the business licensed, and paying the extra cost made necessary by the transaction of the business in the county, what difference does it make which fund the money is paid into? Wherever put the county gets the credit for it, and it offsets the expenditure from any other fund.

"The money, collected by way of a license as a po- "lice regulation, may go into the state treasury for "general revenue purposes, and need not be devoted "specially to the relief of burdens which the prosecu- "tion of the trade, or occupation imposed on the state, "provided that the character of the occupation is such "that restrictions upon its pursuit looking to its partial

"suppression, would be constitutional, whatever their "character may be."

1 *Tiedman State and Fed. Control*, etc., 486.

In the case of *Cooley* v. *Board of Wardens* (2 Howard U. S. 313), it was held that the fact that an act imposing certain pilotage fees on vessels, appropriated the fees to charity, did not impress upon the act the character of a revenue measure.

In *Tomilson* v. *Indianapolis* (144 Ind. 142), the fee from a license on vehicles was applied to the repair of streets.

In *City of St. Paul* v. *Coulter* (12 Minn. 41), the money went into the city treasury without invalidating the ordinance.

In *Littlefield* v. *State* (42 Neb. 223), it went into the school fund.

Notwithstanding the legislative grant of power to license *all* and *every* kind of business and to fix the rate of license tax upon the same the Supreme Court of California held in *Sonora* v. *Curtin* (137 Cal. 583) that the board of trustees of a city cannot in *any way* or *manner* regulate the business or profession of practicing law, hence that as to some businesses no license ordinance would be valid under a power to license in the exercise of police power, and for purposes of regulation. Assuming this view of the law to be correct, the true test as to whether an ordinance is passed in the exercise of the police power, and for purposes of regulation, or as a fiscal measure, would be whether or not the business was a subject for regulation at all.

"When the calling is not dangerous to the public "either directly, or indirectly, it cannot be subjected to "any police regulation whatever which does not fall "within the power of taxation. But those occupations "which require police regulation because of their pe-"culiar character, in order that harm might not come

"to the public can be subjected to whatever police reg-
"ulation may be necessary to avert the threatened
"danger."

(1 *Tiedman on State and Federal Control,* etc., p. 482.)

So that in view of the California case above cited, and so much relied upon by petitioner, the ordinance does not fulfill the test as a revenue measure, but is regulatory, in character, at least, unless it can be successfully shown that the business is not in any degree harmful to the public, which it is submitted cannot be, to say the least, presumed. Now, following the authorities above cited, before the Court can assume, as matter of law that the ordinance is a revenue measure, guided solely by the amount of the license tax demanded, it must find that the tax is so excessive and unreasonable in amount, that under no reasonable state of facts will the amount claimed be needed to pay the expenditures ordinarily the result of such business being carried on in the county, and it is respectfully submitted that a trial of the action was necessary to determine the probable amount needed, which assertion ends the case unless the ordinance is subject to petitioner's contention that it is uncontitutional on other grounds.

All constitutional questions raised have been decided adversely to petitioner by the Supreme Court of the State of California.

It has been squarely held by the Supreme Court of the State of California that a license fee, or charge, is not a tax within the meaning of the constitutional provision that taxes must be uniform.

Santa Barbara v. *Stearns,* 51 Cal. 499;
See also *State* v. *Cassidy,* 22 Minn. 318;
Ex-parte Robinson, 12 Mo. 263.

The same argument by which it is claimed by respondent that the license fee charged is a tax on prop-

erty, and hence if the sheep used in the business had been assessed in the county could have been taxed there under the general levy, would apply to the licensing of any other business—the liquor business, say; the saloon building, liquors, chairs, tables, etc., of the saloon-keeper are assessed and taxed, yet it would hardly be claimed that if he was in addition required to pay a license fee, graduated according to the amount of business done by him, as a condition of doing business, that he could claim that he was doubly taxed, in the unlawful sense, even though the exaction of the fee did produce some revenue, as long as the revenue was needed by the county to pay the costs of the regulation and supervision of his business.

If the butcher, or farmer engage in the business of raising, grazing, herding or pasturing sheep he must pay the license fee.

The case of *Police Jury* v. *Nougues* (11 La. Ann. 739), can be distinguished from the case at bar. In that case the power conferred upon the police jury which levied the tax was as follows:

"To levy a tax on real and personal property and "slaves, upon sheep, vessels, steamboats or other "watercraft landing there for more than five days, ex- "cept the ferry, during the term of the privilege, upon "all wood-yards, carpenter yards, dry docks, livery "stables, bakeries, slaughter-houses, taverns, billiard- "tables, and upon all other objects liable to taxation."

The "objects liable to taxation" include "all persons pursuing any occupations, trades or provisions."

At first blush this case appears to be in point against respondent, but the decision can be accounted for by the fact that the constitution of Louisiana requires that a license tax shall be equal and uniform.

State v. Endon, 23 La. Ann. 663;
New Orleans v. *Iron S. Co.*, 23 La. Ann. 449.

Here the tax is upon the business, and the fee is laid at a certain amount on each sheep, so as to grad-

uate the fee according to the amount of business done. This is the purpose of the classification.

Again there is no constitutional provision in California which requires a uniform operation of municipal ordinances.

Hellman v. *Shoulters*, 114 Cal. 146;
County of Amador v. *Kennedy*, 70 Cal. 459;
Ex parte Haskell, 112 Cal. 416;
Ex parte Hurl, 49 Cal. 557;
See also *State* v. *French*, 41 Pac. Rep. 1078;
St. Louis v. *Green*, 6 Mo. App. 590;
Home Ins. Co. v. *City Council of Augusta*, 50 Ga. 530;
Ex parte Robinson, 12 Nev. 263.

The cases upon this proposition are almost unanimous, and when opposed to the rule are so on account of some special reason not found in this case. If the Court desires to pursue the matter further, most of the cases will be found quite fairly digested at sections 8, 9 and 10 of Licenses, Vol. 32, *Century Digest*, columns 2508 to 2519.

"Certainly, if a charge of five cents a head as in the "seventh class had been imposed upon all sheep, it "would have been more in harmony with the principle "of uniformity and equality declared in the constitu- "tion with reference to taxation."

Cache County v. *Jensen*, 61 Pac. Rep. 303, 307.
See also *Ex parte Sisto Li Protti*, 68 Cal. 635.

"Herding and grazing stock is or may be a business, and it is upon such business that the license is imposed. "That the property used in any particular calling is "subject to and has paid a property tax *ad valorem* " * * * does not interdict the right to impose a

"license upon the business in which such property is "used."

Ex parte Mirande, 73 Cal. 375.

This case disposes of all of the constitutional questions raised.

See also

County of El Dorado v. *Meiss,* 100 Cal. 270;
Sacramento v. *Crocker,* 16 Cal. 122;
Sikes v. *Mayor,* 55 Miss. 115.

All persons engaged in the business of raising, grazing, herding and pasturing sheep are required to procure a license so that the point as to the arbitrary selection has no force. Under decisions cited by respondent, following and including *Pasadena* v. *Stinson* (91 Cal. 238), the selection of a class of persons who raise, graze, herd and pasture sheep would be a proper classification.

When petitioner commenced to do business in the county he became indebted to respondent in the amount due for the license. The right to the sum due vested in the county; hence no appeal could affect it.

It was upon this point that the case was decided by the Circuit Court of Appeals, and the point can only arise in case the Court first decides that the ordinance is a revenue and not a regulatory measure. The opinion in the case fairly presents the point and respondent adopts the opinion as a part of this brief as follows:

"This action was brought by the county of Sierra in the State of California to recover of and from the plaintiff in error herein a lecense tax of two thousand five hundred dollars, it being alleged that the said plaintiff was engaged in that county in the business of sheep raising without having first paid the license tax required by ordinance number 54, passed by the board of supervisors of Sierra county, May 31, 1900. This ordinance consists of ten sections, which are set

forth at length in the complaint. The first section reads as follows: "Each and every person, copartnership, firm or corporation engaged in the business of raising, grazing, herding or pasturing sheep in the county of Sierra, State of California, must anually procure a license therefor from the license collector, and must pay therefor the sum of ten (10) cents for each sheep or lamb owned by, in the possession of, or under the control of such person, copartnership, firm or corporation, and used in such business in said county." This ordinance went into effect June 15, 1900, and ten days thereafter this action was brought. At the time this ordinance was enacted, the board of supervisors of each county of California was authorized, subject to the restrictions and limitations imposed by the constitution and general laws, to license for the purposes of regulation and revenue, all and every kind of business carried on in the county. (Stat. Cal., 1897, 465.) On March 23, 1901, a new section was added to the Political Code of the State of California to be known as section 3366, which repealed the authority of the board of supervisors to license for revenue. (Stats. Am. Code Cal., 1900, 1901, 635.)

The averments in the complaint are sufficient to entitle the county to recover provided the ordinance referred to is constitutional, in all respects valid, and of full force and effect so far as this case is concerned.

The defendant in the court below (plaintiff in error) interposed a demurrer to the complaint on the general ground "that said complaint does not state facts sufficient to constitute a cause of action." This demurrer was overruled "with leave to defendant to answer within twenty days." No answer being filed the Court directed judgment to be entered in favor of the plaintiff, as prayed for in the complaint. From this judgment a writ of error is brought to this Court to have the alleged errors therein corrected. There are five assignments of error which counsel for plaintiff in error have conveniently grouped under three propositions, viz.:

"(1) The ordinance in question is an unjust, dis-

criminating, oppressive and unconstitutional exercise of the power to license for the purposes of revenue.

(2.) By the repeal of the statute authorizing boards of supervisors 'to license for purpose of regulation and revenue' and restricting their power to license 'in the exercise of their police powers and for the purposes of regulation as herein provided, and not otherwise,' without any saving clause in favor of pending suits or unpaid license taxes, the legislature of the state destroyed the cause of action which it had authorized the board of supervisors to create, denied any remedy for its enforcement and abated this action.

(3.) The ordinance is a revenue, not a regulation measure. As an ordinance for purpose of regulation, it is illegal and void, because it does not regulate, and the fee charged is so unreasonable that the courts will, as a matter of law, declare that its real purpose is revenue and not regulation, and therefore void as a pretended exercise of the police power."

In the consideration of the various questions raised in this case, it must be remembered that at the time of the passage of the ordinance herein involved, it was expressly authorized by the "Act to establish a uniform system of county and township governments," approved April 1, 1897. (Stat. 1897, Sec. 25, p. 465.)

The validity of similar ordinances—where several constitutional and other objections were raised—has been frequently sustained by the Supreme Court of California.

In re Guerrero, 69 Cal. 88, 91;
Ex parte Mirande, 73 Cal. 365, 372;
County of El Dorado v. *Meiss*, 100 Cal. 268;
County of Inyo v. *Erro*, 119 Cal. 119;
County of Los Angeles v. *Eikenberry*, 131 Cal. 461, 465, 466.

These decisions are binding upon this Court, and will be followed regardless of the decisions, upon similar questions, in other states. (*Williams* v. *Gaylord*, 102 Fed. 372, 374 and authorities there cited; *id.*, 186

case U. S. 157,167.) It is however claimed that the case in hand presents other objections that were not considered or decided in the decisions above referred to.

. The statute of 1897, among other things, authorized the board of supervisors to pass ordinances "to license, for purposes of regulation and revenue, all and every kind of business not prohibited by law, and transacted and carried on in such county * * * to fix rates of license tax upon the same, and to provide for the collection of the same, by suit or otherwise."

In 1901 the legislature passed "An act to add a new section to the Political Code of the State of California, to be known as section 3366, relating to the powers of boards of supervisors, city councils, and town trustees, in their respective counties, cities and towns, and to impose a license tax," approved March 23, 1901. (Stat. and Amend. to Codes, 1901, 635.)

Section 3366 reads as follows: "Boards of supervisors of the counties of the state, and the legislative bodies of the incorporated cities and towns therein, shall, in the exercise of their police powers, and for the purpose of regulation, as herein provided, and not otherwise, have power to license all and every kind of business not prohibited by law, and transacted and carried on within the limits of their respective jurisdictions, * * * to fix rates of license tax upon the same, and to provide for the collection of the same by suit or otherwise."

The Supreme Court of California has held that section 3366 repeals, by implication, the prior act of 1897, in so far as the same relates to the power to collect a license tax for revenue, thus restricting the licensing power of boards of supervisors, under the act of 1897, to matters of regulation alone.

Ex parte Pfirrman, 134 Cal. 143, 147, 148;
City of Sonora v. *Curtin*, 70 Pac. 674;
Town of Santa Monica v. *Guidinger*, 70 Pac. 732.

What effect does this repealing act have upon the present action which was brought under the provisions of the law of 1897, before it was repealed?

Counsel for plaintiff in error contend, that inasmuch as the law under which the ordinance for revenue purposes was passed, has been repealed, the ordinance is repealed as to all such purposes, and must be regarded as if it never existed except for the purposes of those actions which were commenced, prosecuted and concluded while it was an existing law, and rely upon the rule announced in many authorities, that where the right and remedy is given by statute to bring a civil action for the collection of a license tax, the repeal of the statute destroys the remedy unless the repealing statute contains a saving clause.

Spears v. *County of Modoc*, 101 Cal. 303;
Anderson v. *Burns*, 122 Cal. 273;
State Hospital v. *Flaherty*, 134 Cal. 315;
Ball v. *Tolman*, 135 Cal. 375;
City of Sonora v. *Curtin*, 70 Pac. 674;
Sutherland Stat. Constr., Secs. 162, 163, 166, and authorities there cited;
Endlich on Int. of Stats., Secs. 478, 480.

This principle has been applied more frequently to penal statutes and it may be regarded as an established rule that the repeal of a penal statute without any saving clause has the effect to deprive the court in which any prosecution under the statute is pending of all power to proceed further in the matter, and in such cases the proceeding will be arrested at the very point where it is at the time of the repeal. (*Spears* v. *County of Modoc supra*) because: "The repeal of the law imposing the penalty is of itself a remission." (*State* v. *Railroad Co.*, 3 How. 534, 552, and authorities there cited.)

The ordinance under discussion was adopted May 31, 1900; it went into effect fifteen days thereafter. This action was commenced June 25, 1900. The amendment to the Code, section 3366, was approved

March 23, 1901. The judgment in this case was entered March 7, 1902. Under these circumstances does it necessarily follow that because a saving clause was not inserted, the act of 1901 should be given a retrospective operation? Does this question not depend upon the circumstances and conditions of each particular act, its nature and character? In the present case the transaction between the parties, under the ordinance of 1900 was closed; nothing was left to be done except to collect the license due which was authorized by the law then in force. Upon the facts of this particular case can it be said that it was the intention of the legislature by the passage of the act of 1901 to annihilate the cause of action provided for in the act of 1897, and terminate all pending suits for its enforcement, or was it simply to take away the power of the board of supervisors in the future to license for revenue only?

In *The City of Oakland* v. *Whipple*, 44 Cal. 303, 305, which was an action for the recovery of a delinquent tax which was levied for the year 1869, and the action for its collection was commenced January 17, 1870, it was argued that the law under which said action was commenced was repealed after service of summons and before judgment; and it was there, as here, contended that the act passed in 1870 repealed all prior acts so far as they conflicted with that act, and that the plaintiff was left without any cause of action, and was not thereafter entitled to maintain an action for the collection of a tax theretofore levied. The Court said "To hold that the act (of 1870) was intended to have a retrospective operation, so as to affect taxes which had already become due, would be to hold that the legislature intended to remit all those taxes. A result so manifestly incompatible with the plainest provisions of the constitution, would not be inferred, but must be made apparent by clear and unequivocal language. That construction is not necessary in order to give full effect to the act, and, in our opinion, it was not intended that the act should have a retrospective operation; but the intent was that the

taxes then due should be collected according to the law then in force."

In *The Town of Belvidere* v. *Railroad Co.*, 34 N. J. L. 193, 195, where an act authorizing the levying of a certain tax on the capital stock of the defendant was repealed after an assessment of the tax, but before its collection, it was held that the repeal did not prevent the collection of such tax, its collection being regulated by the general tax law, which had not been repealed. In the course of the opinion the Court said: "The general legal rule, as found in *Dwar on Stat.* 676, is referred to, viz., 'That when an act of Parliament is repealed, it must be considered (except as to transactions passed and closed) as if it had never existed.' But even if we accept this definition as strictly correct in its application to every case, still it is not perceived how, by force of it, the present tax is to be avoided. The case seems to fall within the exception contained in the rule as just quoted. The assessment of this tax closed and ended the transaction, so far as the act of 1862 was concerned. That act authorized the assessment, and appointed the mode of making it, but it had nothing to do with its collection, which was and is altogether regulated by other acts. When, therefore, this assessment was made, the force of the act of 1862 was, with respect to it, wholly spent and exhausted; the thing authorized to be done was completely done, and the consequence is, that even on the most stringent application of the rule as claimed, a repeal of the statute cannot invalidate a proceeding that was fully perfected while such statute continued in force. * * * As a question of intention, it is certainly very improbable that the legislature in 1866, by the repeal of the act of 1862, intended to annul assessments which had been made under the latter act, and which remained uncollected by reason of litigation, or from any other cause. Such a supposition would be most unreasonable. * * * As the tax now in controversy was assessed during the existence of the act of 1862, and as the proceedings for its

collection do not depend on that act, my conclusion is, that the subsequent repeal of that statute cannot, on general principles, invalidate such assessment."

See, also,

Dodge v. *National Bank,* 109 Fed. 726, 731, and authorities there cited.

The defendant in error contends that the license fee or tax, after the preliminary steps taken for its collection, became a debt (and it is so expressly declared to be in the ordinance in question); and that it had a vested right to collect the same. It has frequently been held that a direct tax duly assessed and levied upon real or personal property, is not a debt within the broad meaning of that term. But a license fee or tax does not stand upon the same plane. It is true that a vested right is usually based upon contracts, but it may also be based upon transactions in the nature of a contract.

In *Sutherland on Stat. Const.* Sec. 164, the author said:

"When a right has arisen on a contract, or a transaction in the nature of a contract authorized by a statute, and has been so far perfected that nothing remains to be done by the party asserting such right, the repeal of the statute will not affect it or an action for its enforcement. It has become a vested right which stands independently of the statute."

The same rule is laid down by the Supreme Court of the United States in *Steamship Co.* v. *Joliffe,* 2 Wall. 450, 455, where a pilot licensed under a statute had tendered his services to pilot a vessel out of port, and such services were refused, the Court held that his claim to the half pilotage fees, allowed by the statute in such cases became perfect, and that the subsequent repeal of the statute did not affect the judgment rendered in an action brought to recover his claim. In the course of the opinion the Court said: "The tran-

saction * * * between the pilot and the master or owners cannot be strictly termed a contract, but it is a transaction to which the law attaches similar consequences; it is a quasi contract. The absence of assent on the part of the master or owner of the vessel did not change the case. In that large class of transactions designated in the law as implied contracts, the assent or convention which is an essential ingredient of an actual contract is often wanting. * * * In such case the party makes no promise on the subject; but the law, 'consulting the interests of morality,' implies one; and the liability thus arising is said to be a liability upon an implied contract."

In the present case the plaintiff in error did not directly promise to pay the license tax demanded by the defendant in error, but he herded and grazed his sheep in Sierra county when the law for the imposition and collection of the license tax was in full force and effect. He reaped the full benefit of the law, and then refused to comply with it. Do not these facts virtually bring this case within the rule announced in the Joliffe case?

Similar principles are announced in *United States* v. *Williams,* 8 Mont. 85, 90, where the defendant sought to avail himself of the repeal of the regulations by the Secretary of the Interior forbidding the cutting of timber on the public land. In the course of the opinion the Court said; "The question then arises, What were the rights of the United States in relation to this timber? * * * The timber had been unlawfully cut and converted and the right of the United States to receive compensation for its property completely vested. What effect, then, did the subsequent revocation of these rules and regulations, touching the cutting of such timber, have upon this right? We take it that the modification of the rule is analogous to the repeal of the statute, and that its effect must be determined by the rules of law, governing the repeal of the statute under which the alleged right had arisen, and which was being prosecuted in the courts, but still had not been reduced to a judgment."

After referring to the general rule, the Court said: "But there are certain exceptions to this general rule. Where trouble and expense may have been incurred, and suits may have been instituted, the effect of a retrospective construction of repealing statutes is entirely to derange the plans and defeat the arrangements of parties who have proceeded on the faith of antecedent legislation, and an effort has been made to arrest these results and certain exceptions have been made to this retroactive legislation. Where, then, a right in the nature of a contract has vested under the original statute, then the repeal does not disturb it." The Court then states and approves the rule in the case of *Steamship Co.* v. *Joliffe, supra,* and adds: "While the action in the present case cannot be said to be one of contract, but an action of tort for the wrongful cutting and conversion of the timber of the plaintiff, it is hard to imagine a distinction between the right to recover for trees cut and converted wrongfully, and money due for their delivery under contract. If the right is vested in the one case, it seems to us it is equally as clearly vested in the other. Indeed, the timber when cut may be deemed personalty, and the plaintiff might waive the tort, and sue for it in assumpsit as so many cords of wood sold and delivered. It seems to us, then, that the plaintiff's right in this case comes within the exceptions to the general rule already stated, by which the right of action is defeated upon the repeal of the law under which it was brought."

The following additional authorities are cited:

> *Appeal* v. *Western Md. R. R. Co.*, 50 Md. 293; *Eastman* v. *County of Clackamas*, 32 Fed. 31-34.

Petitioner's criticism of the decision brings up the question as to whether there is such a conflict between the case as decided by the Circuit Court of Appeals,

and the cases of *Sonora* v. *Curtin* (137 Cal. 583) and *Santa Monica* v. *Guidinger* (137 Cal. 658) as decided by the Supreme Court of the State of California, as would compel this Court under the rule cited by petitioner, and of which there is no question, and no complaint, to follow the decisions of the Supreme Courts of California last cited as being a part of the local law on the point in question.

With due respect to the learned and eminent counsel for petitioner it is submitted that the conflict between the two Courts does not arise out of a construction of a statute of the state.

It is true that the Supreme Court of the State of California has in the cases cited by petitioner decided that the power to license for revenue has been repealed, but this the Circuit Court of Appeals does not controvert and for this purpose only was it necessary to construe the statute, hence as to the *construction* of the statute there is no conflict between the two courts. The conflict comes as to the effect of the new statute, construed by each court to be a repeal of a prior statute, upon the rights of the litigant granted under the prior statute, the Circuit Court of Appeals first assuming, but not deciding, that the ordinance *may* have been a revenue measure, and the Supreme Court of California deciding that in its cases the ordinance *was* a revenue measure. This question did not involve the construction of the statute; it was merely the determination of a question that depended upon the principles of general law and not upon a positive statute of the state. In such cases courts of the United States are not required to follow the decisions of the State Courts.

Hough v. *Texas* and *Pacific R. R. Co.*, 100 U. S. 226. (25 L. Ed. 618);
Pine Grove Township v. *Talcott*, 86 U. S. 666 (22 L. Ed. 232);
Venice v. *Murdock*, 92 U. S. 494 (23 L. Ed. 583);
Clapp v. *Otoe County*, 104 Fed., 474;

Gilbert v. *American Surety Co.*, 121 Fed. 499-502;
City of Ottumwa v. *City Water Supply Co.*, 119, Fed. 324.

The reason for the rule that when the decision of a question involves the construction of a state statute the decision of its highest court should be followed is stated by this Court in *Norton* v. *Shelby County* (118 U. S. 425), but in a case like the present where the Court applies a state statute to a situation not involving the construction of the statute, while the decision of the State Court is entitled to the highest consideration, it is only to be followed when consistent with the general law upon the subject.

The decision in *Sonora* v. *Curtin* followed in *Santa Monica* v. *Guidinger,* is wrong, in so far as it conflicts with the decision of the Circuit Court of Appeals in this case. It does not appear that the authorities upon which the Circuit Court of Appeals relied were before the Court, and the Court seems to narrow the purpose of the action into the recovery of a penalty solely, and not a debt, and in his application of the case here petitioner would deny that he had received any benefit from the ordinance.

In treating the sum sued for as a penalty the Court was probably affected somewhat by the fact that a ten dollar penalty was added to the demand for a three dollar tax, while in the case at bar the penalty of fifty dollars provided for by the ordinance is not sued for. (Transcript fol. 4, p. 3—fol. 8, p. 5.)

The Court says:

"The defendant does not owe for any license be-"cause he refused to take out a license. The recovery "is sought for his refusal."

Is this not the reason for every recovery in case of debt.

Petitioner asks, "What benefit did he reap?" "What benefit did the law confer on him?" These

questions are answered by the facts that he was protected in his business, and the protection paid for by the county; that his damage to public property was repaired and paid for by the county; that lanes across valleys in the fenced portions of the county were furnished him by which he could conveniently reach pastures, and in numerous ways was he benefited. Even treating the ordinance, for the sake of argument, as a revenue measure, one of its aims was reimbursement for these expenses. In effect the county proposed to petitioner that if he came to the county to raise, graze, herd and pasture his sheep that roads and trails damaged by him would be repaired for other travelers, that he would be given the protection of the police force of the county, etc., etc., for a contribution on his part of a part of the expenses of the county government, and he commenced to transact his business in the county after this proposal, did he not in effect accept it?

It is respectfully submitted that the judgment of the Circuit Court be affirmed.

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